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IN THE

Supreme Court of the United States

October Term, 1948

No. 222 - 223

JOHN S. BLEKER, JR., and RALPH L. [illegible],

Petitioners,

vs.

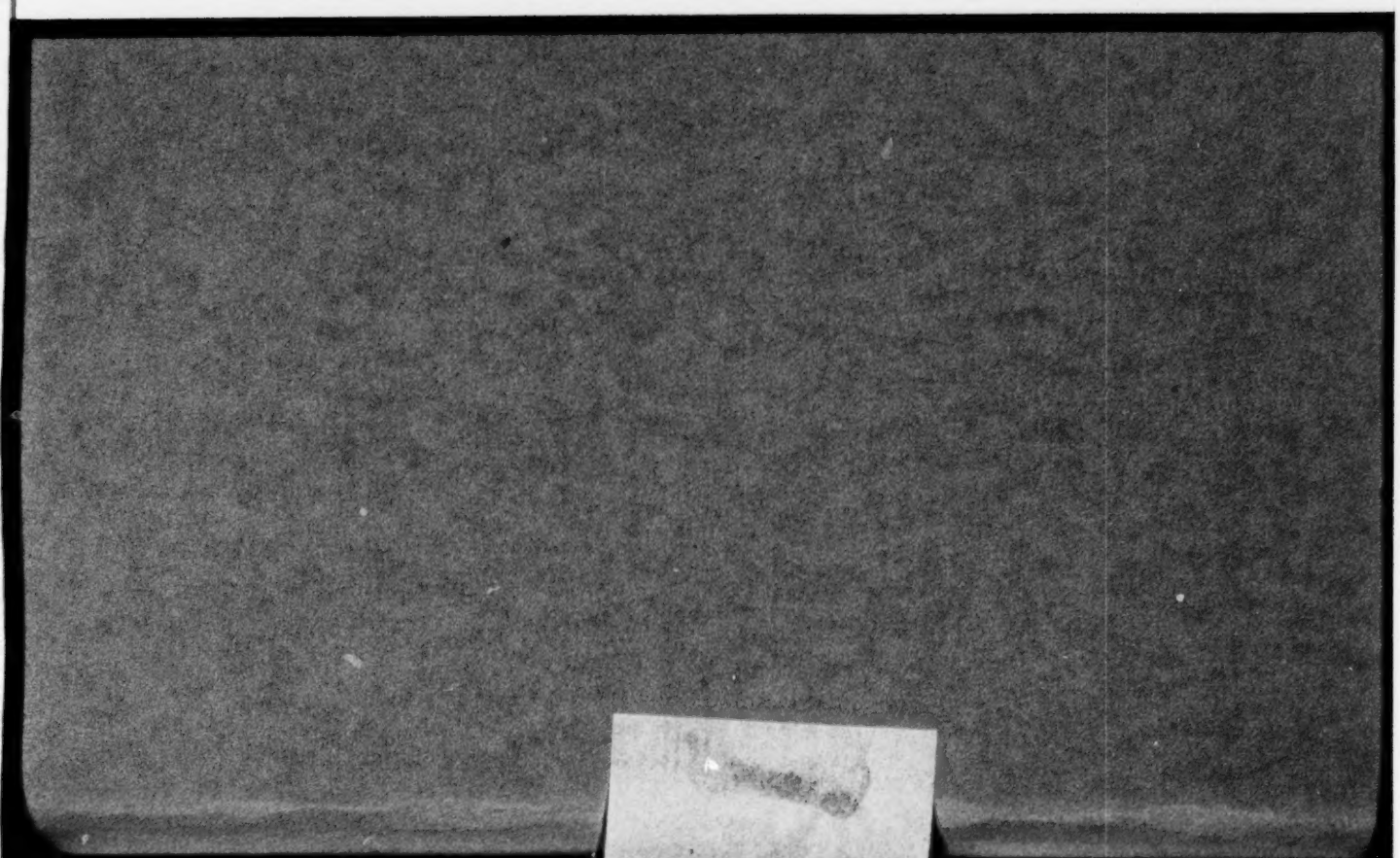
UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

October Term, 1948

No. .....

JOHN S. BLEKER, JR., and RALPH L. ROBINSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice Fred M. Vinson, and to the Honorable Associate Justices of the Supreme Court of the United States:

This is a petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the judgments and sentences of imprisonment of Captain Ralph L. Robinson, Captain United States Marine Corps, and Major John S. Bleker, Jr. Specially the particular petition herein is on behalf of Ralph L. Robinson. Leave to proceed on the typewritten record, here, as appellants did in the Circuit Court, is also requested, as petitioner is without funds to pay for the printing of same.

Jurisdiction.

Jurisdiction is conferred by Title 28, United States Code, Judiciary and Judicial Procedure, Section 1251 and Section 1254(1), and by the Rules of the Supreme Court of the United States, in criminal cases after verdict.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered May 26, 1949, the opinion being written by Black, District Judge. A petition for rehearing was duly and regularly filed within the time fixed by law and the petition for rehearing was denied on June 29, 1949. Petition for certiorari is being filed in the Supreme Court of the United States within 30 days of said date as fixed by the Rules of the Supreme Court of the United States.

Opinion Below.

The opinion below has not been published but is to be found on page 1553 of the Record, to page 1563 of the Record.

Statutes Involved.

Title 18, Section 80, United States Code (Criminal Code, Sec. 35a), which provides as follows:

> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any

claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall *knowingly* and *wilfully* falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

* * * * * * * *

Fifth Amendment to the Constitution of the United states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, **except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger**; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case.

Captain Ralph L. Robinson was at all times involved in this case, a Captain in the United States Marine Corps. About the middle of September, 1943, Captain Robinson was transferred to the 25th Regiment, Fourth Division, of the Marines at Camp Pendleton, California. Being sent overseas with the Fourth Division he served in command of the burial detail at Marshall Island, Marianas, Okinawa, Saipan, and Tinan. He received concussion from a bursting shell at Saipan and contracted malaria or tropical fever. Thereafter he was transferred to the Marine force as executive officer and quartermaster of a specialized M. P. battalion.

On May 19, 1945, he was admitted to the United States Naval Hospital, Section 118, at Guam. He was hospitalized by reason of further concussion received at Okinawa, and because of the continued effect of the fever theretofore contracted. He was transferred from the Guam Hospital, to Pearl Harbor Hospital, No. 128, and to the Naval Receiving Hospital at San Francisco. Then to the Santa Margarita Hospital in Oceanside. He returned to active duty September 14, 1945, after his release from hospitalization. At that time he was assigned to duty as a buyer for the Camp Pendleton Post Exchange, where he served until February 16, 1946, when he received his terminal leave and was employed thereafter as a buyer until April 5, 1946.

On April 5, 1946, he was recalled to active service in the Marine Corps, and was retained in the position as buyer at the post exchange. On April 21, 1946, he was placed under military arrest at 8:00 o'clock in the morning and placed in custody of an armed guard who kept him

without food in the office of the Chief of Staff until about midnight, when he was interrogated until about 2:00 a. m. the following morning. There were participating in the interrogation an agent of the Federal Bureau of Investigation, a Naval Intelligence Officer, and a Marine Intelligence Officer. All of them took part in the questioning. He was not represented by an attorney, and there was no one present who was friendly with him or to whom he could look for advice. He was not allowed to communicate with anyone from the time of his arrest and for several weeks later. He was not informed as to the reason for his arrest; he was not brought before any court-martial. In this questioning certain facts were frequently assumed and he was asked if they were not true. He continued to deny the charges and statements made to him. He finally told his questioners, including the FBI, the Marine Intelligence Officer, the Naval Intelligence Officer and those participating in the questioning, that he was too ill to be questioned further and that he was too tired and if they would desist he would give them a statement after he had rested. Later that morning they brought a statement to him already typed for his signature. The statement contained matters which were not true. He said so at the time. He was told to go ahead and sign it anyway, that that was what they would all testify he had said and Mr. Walters, the agent of the Federal Bureau of Investigation, said if he did not sign they could make it very disagreeable for his wife and family. Participating were FBI agents and military personnel.

He did not want to sign it and did not do so voluntarily, but did so under compulsion. It contained statements which were untrue including the statement that he made the declaration voluntarily.

He was held under armed guard after his interrogation and until a statement was signed. Thereafter he was held in solitary confinement until June 7, 1945, a period of more than six weeks.

From the moment of his arrest until that date he was confined to his room with an armed guard constantly in attendance. The guard sat beside him when he slept, the guard conducted him to his meals and forbade him to speak to anyone. He accompanied Captain Robinson even when it was necessary to perform physical functions. During all this time, with a single exception, he was not permitted to communicate with anyone, neither with his wife nor his attorney, nor with anyone for the purpose of procuring legal counsel. His health, which was in very bad condition, was made worse by his confinement.

Without actually introducing the document in evidence, the cross-examination by the government of the petitioner was made upon matters secured by this involuntary confession, and the government sought to bring out things in the third degree confession, and questioned him about beer contracts and other matters contained therein not relevant in the trial. The appellant was questioned whether on April 22, 1946, he had answered questions of FBI Agents Walters, Major Durgance and Commander Murrell [R. 1339], thereupon counsel for the government proceeded over appellant's objection to attempt to get before the jury the statements and the nature of the confession extorted from the appellant under duress, and to ask him if those statements which he had made to those people at that time were true, or untrue [R. 1340, 1345]. He attempted to repeat the illegally gotten evidence by questioning the appellant, Captain Robinson, about it in the very presence and eyes of the Judge and jury. This was in violation of due

process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

In addition to questioning from the illegally gotten confession, the Court permitted the cross-examination of the appellant of matters not brought out on direct examination contrary to petitioner's rights against self-incrimination. The appellant, Captain Robinson, was questioned about an alleged bribe relative to certain beer contracts and other matters about which nothing had been asked him on direct examination.

At the outset of the trial the government put on a witness named Cates, and asked him, with the permission of the Court, a number of leading questions, the answers to which were false and which must have been known to the government to have been false.

Furthermore, the witness Cates was placed on the witness stand to testify to matters apparently relevant to Count I of the indictment and relating solely to Major John S. Bleker. At an early stage in the case, the government put on the stand Colonel Selden to testify to conversations which he had with Major Bleker. The evidence was offered only as against Major Bleker and not against Captain Robinson. The attorney for Captain Robinson asked if he could not defer cross-examination but the Court declined to let him defer such cross-examination, stating that if he intended to cross-examine him at all, he had to do so at that time. Counsel for Captain Robinson stated to the Court that he had no cross-examination of Colonel Selden if it was not to apply to Captain Robinson, but that if it was to apply to Captain Robinson he wanted to cross-examine him. The trial Court in answer to this request stated that he would not permit any

cross-examination at a later time, that the cross-examination had to be done at that time or not at all.

> "The Court: I will state that if you do not cross-examine him now, I am not going to have him called back later on unless you want to use him as your own witness. That is all there is to it." [R. 66.]

This was the language of command. Disobedience thereto would have subjected counsel to punishment for contempt.

At the close of the case, the government moved to make the testimony of Colonel Selden applicable to all of the defendants including Captain Robinson, although the Court had told counsel for Captain Robinson that his only opportunity of cross-examination was at a time when his testimony was limited only to Major Bleker.

During the trial of the case the Court permitted a mass of irrelevant testimony against the petitioner Robinson to be presented to the jury by the witness Cates. This testimony related: (1) to the presentation of a fur coat by someone unrelated to the parties in the case. Also that Stephen Corbett and Lawson Lindy were produced as witnesses for the government and were permitted to testify. The government was permitted to question Stephen Corbett and Corbett was permitted to testify in substance that Captain Robinson solicited a bribe of $31,000.00 from him [R. 570-573] at a time before any alleged conspiracy was formed and without any relevancy to the case on trial. Lawson Lindy was permitted to give similar testimony. There was no charge of bribery in the allegation in the indictment, and the testimony of Gleason makes this apparent that no conspiracy had been

contemplated by the parties at the time of these alleged occurrences. The appellant, an officer in the Navy, was charged with violating his faithful duties as an officer by offending an Army regulation. There was no testimony that the appellant ever knew any of the Army regulations involved. The regulations, which were never shown to be within his knowledge, or within his scope or authority of duty, were introduced in evidence over his objection and permitted to stand.

The trial was held in the noisy courtroom in San Diego. It was impossible for counsel defending appellant to hear many of the witnesses. The trial Court, nevertheless, criticized counsel for the appellant in the trial for insisting on the record being read when he could not hear it.

The appellant made an affidavit that the jury impaneled to try his case was not drawn in accordance with the requirements of the statute and this affidavit was not denied. No military person sat on the jury nor were in the panel, either of the grand jury that indicted him nor on the trial jury. Military witnesses were easily available at that time in the military jurisdiction and subject to military subpoena. He was not placed on trial until several months later in the civilian courts and without the availability of the witnesses or persons who might properly assist in giving the facts of the case.

An indictment was returned against Major John S. Bleker, Jr., and Captain Ralph L. Robinson, both in the United States Marine Corps, and Robert S. Gleason, a civilian attached to the post and therefore subject to court martial by a Federal grand jury for the Southern District of California on four counts on August 21, 1946.

Count One charged the defendants and one Robert S. Gleason, a civilian employed by the Camp Pendleton Post Exchange as office manager (but nevertheless subject to court martial), with conspiracy to defraud the United States by depriving it of the services of defendants Robinson and Bleker; and the further purpose of impairing, obstructing and defeating the lawful function of the United States Army, the United States Marine Corps and the Navy Department of the United States in supervising and controlling the sale of property of the United States so that said property would be first available to designated persons and agencies other than civilian dealers; the further purpose of committing offenses against the United States and violating Section 80, Title 18, U. S. Code.

It was alleged to be a part of the conspiracy that the defendants would purchase from government supplies scarce merchandise and sell it to civilian dealers not authorized to purchase it from the sellers. The ten overt acts were alleged, which included the transactions alleged in Counts Two and Three of the indictment.

The defendants were acquitted of Count One, the charge of conspiracy. Acts alleged in Counts Two, Three, and Four were acts charged to be the conspiracy in Count One.

In Count Two the defendants were alleged to have knowingly and wilfully concealed and covered up by trick, scheme and device a material fact within the jurisdiction of the Marine Corps in that one Dave Rose, a civilian doing business at Los Angeles, did, on April 15, 1946, pay to the defendants the sum of $8,146.90 as one-half of his profit on the resale of 2,279 watches sold to him on

March 6, 1946, by the Camp Pendleton Post Exchange. It was alleged that the books of the Post Exchange only showed the prices for which the watches were sold to Rose, to wit, $37,174.00, and failed to show any sum of money the defendants personally received later.

Count Three alleges that the defendants purchased equipment on February 26, 1946, from the Los Angeles Port of Embarkation Post Exchange, Wilmington, California, for $1,675.25. It is alleged that they concealed a material fact in the jurisdiction of the United States Army in that they failed to reveal to the Army that they bought the equipment for resale for their own use and not for the Camp Pendleton Post Exchange, and that the defendants resold the equipment to a civilian dealer in March, 1946, for $4,876.50.

Count Four alleges that on March 27, 1946, the defendant Robinson purchased some equipment from the Santa Ana Army Air Base Post Exchange at a price of $522.20; that on the same date he made a false certification in connection with the sale, to wit, that the equipment was being purchased under the veterans' clause either for his own business or profession and not for resale, whereas the defendant purchased the equipment for resale to a civilian dealer.

On September 16, 1946, defendants Robinson and Bleker moved to dismiss their action and in the alternative both defendants moved for a bill of particulars.

On October 25, 1946, the motions for dismissal were denied as to all defendants and a bill of particulars allowed in certain respects [C. T. 74-75].

On November 1, 1946, a bill of particulars was served and filed by the plaintiff in response to the order [C. T. 100].

On December 6, 1946, three days before trial, without leave of court the plaintiffs served and filed a Supplemental Bill of Particulars, admitting that the Regulations were different than they had served in another Bill of Particulars [C. T. 129]. Proof did not correspond to the first bill.

The case went to trial December 9, 1946 [C. T. 133].

On December 21, 1946, defendant John S. Bleker, Jr., was found not guilty as to Counts One, Two and Four, but guilty as to Count Three of the indictment. Defendant Ralph L. Robinson was found not guilty as to Count One, but guilty as to Counts Two, Three and Four of the indictment.

Motions were made in arrest of judgment and the alternative for a new trial and were denied January 10, 1947.

As to Captain Ralph L. Robinson, the Court ordered imprisonment for one year in an institution of the jail type on Count Three; on Count Two a fine of $5,000.00; on Count Four a further fine of $5,000.00, making a total of $10,000.00, the defendant to stand committed until fine is paid [C. T. 315]. As to defendant Bleker, a fine of $5,000.00 was imposed on Count Three, defendant to stand committed until the fine is paid [C. T. 316].

A Notice of Appeal from the judgments was filed January 20, 1947, as to Bleker [C. T. 318], and as to defendant Robinson on January 15, 1947 [C. T. 319].

Questions Presented by This Petition.

1. Whether a person who has been illegally kept in confinement for a long period of time and is not properly arraigned or brought before any courtmartial or civilian magistrate and after prolonged questioning submits to making a statement, may thereafter be indicted by civilian jury and questioned from the witness stand on the basis of that statement without offending due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

2. Whether a person who has been recalled to military duty from terminal leave for the purposes of arresting him and confining him upon a charge of violation of some military provision relating to his Post Exchange may thereafter be denied the right of trial by a military court-martial of men at least half of whom are of his own rank or greater, and who have understanding of military affairs "and whether he may be given," a trial in a civilian court by persons who are not his peers and are not the same as those who are in a military tribunal with full understanding of all the military regulations connected therewith and all right of review by military authorities and ultimate restoration so made. Whether this violates due process of law.

3. Whether the discharge of the appellant by the military court-martial without a trial constituted jeopardy or *res judicata* of the issues where he could have been tried by the military authority, was held in their custody for seven weeks and thereafter discharged without a trial.

4. Whether the acquittal of the appellant on Count I of the Indictment to which the conspiracy charge covering every feature of the other three Counts was necessarily

res judicata and an acquittal of the other three counts involved in the indictment, even though they occurred in the same trial.

5. Whether the appellant was denied fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States, where the prosecutor presented evidence which he must have known to be false at the time he presented it to the court and jury.

6. Whether trial court erred in permitting the testimony of Colonel Selden to be made applicable to the appellant after he had forbidden the appellant to conduct cross-examination at the beginning of the trial and during Colonel Selden's original testimony when that testimony was not made applicable to the appellant at all.

7. Whether the appellant's rights were infringed under the self-incrimination clause of the Fifth Amendment to the Constitution of the United States.

8. Whether the appellant was denied the fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States in that the prosecutor presented evidence to the jury for the purposes of prejudicing the defendant in their eyes, namely, that the appellant had given a bribe to a witness named Cates and had solicited a bribe from two other witnesses named Corbett and Linde. No charge of soliciting or receiving a bribe was filed against the defendant; the alleged acts assertedly occurred two months prior to the date of the formation of the alleged conspiracy and the introduction of this extraneous evidence deprived the defendant of a fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

9. Whether the Indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

10. Whether the indictment was fatally defective. The court should have sustained the motions to dismiss and the motions in arrest of judgment because of these defects.

A. Where the facts alleged in the indictment are equally consistent with innocence, no crime is charged.

B. Where in the first count of the indictment the defendants were charged with having conspired to commit the substantive offenses charged in Counts Two, Three and Four and the facts constituting those offenses were set up in the first count as overt acts. In Counts Two, Three and Four the defendants are charged with having jointly committed the offenses charged therein. Therefore, everything that was charged in the last three counts of the indictment were charged in the first count upon which he was acquitted. By the acquittal the Court lost jurisdiction to try him further for any of the offenses alleged in the first count of the indictment.

11. Whether the Court erred in denying appellant a full Bill of Particulars as prayed for and in granting only a very limited Bill of Particulars.

Whether permitting an amended or supplemental Bill of Particulars to be filed three days before trial, without leave of court was error and whether there was a failure of

proof by reason thereof since the proof did not establish the facts under the first bill.

12. Whether the evidence was insufficient to sustain the verdict.

13. Whether the Court erred in its rulings and in the admission and exclusion of evidence in the trial of the case.

Whether the Court erred in admitting and excluding evidence and particularly as follows:

A. The Court erred in receiving irrelevant and highly prejudicial evidence over objection of appellant and refusing to strike out the same [R. 487, 488, 489, 490, 491, 492, 570-573, 574, 576, 1467, 1468].

B. Whether the Court erred in permitting appellant to be cross-examined as to matters concerning which he had not testified in chief and in thus being made a witness against himself.

C. The Court erred after appellant had been cross-examined on his examination in chief, in refusing to permit him to testify in detail in regard to all of the new matter thus brought out upon cross-examination.

D. The court erred in denying the appellant the right to cross-examine the witness Cates fully as to the relation which Cates claimed existed between appellant and said witness and to learn from the witness whether or not he claimed to have been a party

to the conspiracy charged against appellant [R. 646, 647].

E. The Court erred in refusing to permit Major Bleker to testify in contradiction of Colonel Barry as to the substance of a conversation to which Colonel Barry had testified for the Government [R. 646, 647].

F. Whether the Court erred in permitting appellant to be interrogated in regard to a confession obtained from him under duress and in denying his offer to show the circumstances under which said statements were made as required by due process of law.

14. Whether the Court erred in denying appellant the right to defer the cross-examination of Colonel Selden until it could be ascertained what portion of his testimony would be received against appellant and in insisting that appellant's right of cross-examination be exercised at a time when all of the material testimony of the witness had been limited to appellant's co-defendant ,Major Bleker and thereafter admitting the testimony against appellant Robinson [R. 66].

15. Whether the conduct of the prosecutor and Court in the trial constituted grave prejudicial misconduct depriving the defendant of a fair trial.

16. Whether the Court erred in giving and refusing instructions and particularly in denying proper instructions offered by appellant.

(1) The Court invaded the province of the jury in its instructions regarding what are "material facts."

(2) The Court erred in giving a confusing instruction regarding reasonable doubt.

(3) The Court erred in failing to instruct the jury as to "guilty knowledge" necessary to convict as to counts 2, 3, and 4.

(4) The Court erred in refusing instructions on the defendant's theory of the case.

(5) The Court erred in refusing instructions regarding the weight to be given to the testimony of an accomplice and other witnesses.

(6) The Court erred in refusing instructions on good faith as a defense.

17. Whether the Court erred in refusing to arrest judgment because of (1) lack of jurisdiction, (2) use of illegally secured evidence in violation of the Fifth Amendment, (3) double jeopardy, (4) illegal selection of the trial jury, and (5) of the Grand Jury.

18. A. Whether the Court was without jurisdiction to try Robinson and a motion in arrest of judgment should have been granted because the Grand Jury which indicted Robinson was impanelled in Los Angeles and was therefore a different division than San Diego where the trial was held.

B. Whether the Court should also have granted the Motion in Arrest of Judgment for the reasons: (1) The Grand Jury which indicted the appellant was illegally composed. (2) The Petit Jury which tried the appellant was illegally composed.

19. Whether a District Court Judge of the United States may constitutionally sit on a Court of Appeals and review the acts of another District Judge.

Reasons for Granting the Writ.

I.

The questions raised in this petition are highly important in the administration of criminal justice and raise fundamental questions of criminal law not heretofore decided but which should be decided by this Honorable Court.

II.

Where the question of the misuse of an illegally gotten confession is raised this Court will itself examine the record to see if the defendant has been denied due process of law. This is true whether the conviction has occurred in a state or federal court.

Lisenba v. California, 314 U. S. 216.

III.

There is a conflict of the opinion of the Circuit Court of Appeals and the opinions of this Honorable Court on the questions involved.

IV.

This Court should settle whether military personnel, attached to the military branch, are entitled to a military trial, and whether the defendant has therefore been denied due process of law guaranteed to military personnel under the Fifth Amendment to the Constitution of the United States in time of war, and where a fundamental constitutional question has been raised and presented and decided contrary to the express provisions of the Constitution, this Court should decide the matters.

V.

This Court has not passed squarely upon the exclusive right of a military person to be tried exclusively by other military personnel and his case reviewed by military personnel on an alleged offense occurring on Military Reservations and a part of the military scheme of things.

Ex parte Richard Quirin, 317 U. S. 18, 87 L. Ed. 1.

VI.

Fundamental questions of importance in criminal law are raised by this case. This Court should exercise its supervisory power in the matter.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1948.

No.....

JOHN S. BLEKER, JR., and RALPH L. ROBINSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

References to the Opinion Below and Statutory References and Regulations are contained at the opening of the Petition and are herein incorporated by reference, as is also the statement of the case.

Summary of the Argument.

This Court should grant a hearing in this case to settle important questions of criminal law affecting Military personnel while they are in or attached to the Military Branch of the government, and because the decisions in the courts below, decided by a District Judge sitting temporarily in the United States Court of Appeals for the Ninth Circuit, wrongfully determined the law, and the petitioner's fundamental constitutional rights were invaded and the decisions are contrary to the decisions of this Court in those phases which have been passed upon by this Court; but other phases have not been passed upon by this Court.

I.

Petitioner, Captain Robinson, Was Entitled to Be Tried by a Military Courts Martial as Due Process of Law. A Civilian Court Was Without Jurisdiction to Try Him.

This Court has not heretofore decided whether a person in the armed forces of the United States in time of war, charged with offenses or acts within his duties in a Military Reservation is entitled, as a matter of due process of law, to be tried by a military courts martial, and not by a civilian court.

Heretofore the cry has generally been for a jury trial.

Ex parte Quirin, 317 U. S. 18, 87 L. Ed. 1.

The nearest approach was in *Caldwell v. Parker,* involving a state charge of murder of a civilian, and not within the confines of a camp subject to military jurisdiction.

In *Caldwell v. Parker,* 64 L. Ed. 621, at 623, the court said:

> "It cannot be disputed that the effect of this grant was to confer upon courtsmartial as to offenses inherently military an exclusive authority to try and punish."

In the case at bar the alleged occurrences were military in their nature and involved military property.

Captain Robinson and his co-defendant, Major Bleker, and Robert Gleason, attached to the military branch, were entitled to a military trial as due process under the Fifth Amendment to the Constitution of the United States. Captain Robinson was an officer of the Navy

and was entitled to be tried according to Naval law, which permitted him to have officers try him, half of whom or more were of the same or higher rank, by a general courts martial on the charges involved in this case. He was entitled to be sentenced by such a court-martial, to have his sentence reviewed by a military reviewing tribunal that may consider both law and facts and modify his sentence and restore him to duty and honorable discharge.

The Fifth Amendment provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the militia,* when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law."

U. S. C., Title 34, Section 1200, says:

> "The Navy of the United States shall be governed by the following Articles: (R. S. §1624) from Act of July 17, 1862, B. 204, Sec. 1, 12 Fed. 600."

The trial courts have read into this section "shall be governed by the following articles and other Federal Laws of the United States," but the section does not so state. The entry into military service subjects them to the military law and not the civilian law.

> *Ex parte Milligan,* 4 Wall. (71 U. S. 2, 18 L. Ed. 281);
>
> *In re Davidson,* 21 Fed. 618;

Ex parte Reid, 100 U. S. 13, 25 L. Ed. 538;

Johnson v. Thayer, 158 U. S. 109, 29 L. Ed. 914;

McGlensy v. Van Vrankin, 163 U. S. 694, 41 L. Ed. 311, reversing 57 Fed. 888;

United States v. Bogart, 3 Fed. 257;

In re Bogart, Fed. Case 1596, 2 Story 396;

Smith v. Whitney, 114 U. S. 564, 29 L. Ed. 601;

Smith v. United States, 26 Court of Claims 143, 18 O. A. G. 176.

Article 39 provides for the composition of a general court martial and provides that it shall consist of not more than thirteen nor less that five *commissioned* officers as members of the same or higher rank as can be convened without injury to the service. The senior officers shall always preside and others shall take place according to their rank.

Article 14 provides for offenses similar to, or identical with the one the respondent was charged with.

The navy has set up a complete system for trial and the type of persons who should try them. It was therefore a denial of both the first portion of the due process of law clauses guaranteed by the Fifth Amendment to the Constitution of the United States to subject the appellant to a civilian trial when he was still in the navy and still subject to its jurisdiction for identical offenses.* As a matter of fact, the petitioner is still in the United States Navy and not discharged therefrom.

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*The appellant was in the Navy at the time of his indictment. The property involved was Naval property in a post exchange. The acts are all alleged to be in connection with his conduct in the Navy.

The Navy thus took jurisdiction of the defendant first. It was his right to be tried by the Navy thereafter regardless of whether or not the Navy declined to try him. He could not be kicked around from jurisdiction to jurisdiction as to whoever might want to proceed against him.

Ex parte Richard Quirin, 317 U. S. 18, 87 L. Ed. 1.

The language of Section 1200 of Title 34, that "The Navy *shall be governed*" are words of command.

Anderson & Wisconsin R. Co. v. Foley, 94 U. S. 100, 24 L. Ed. 71;

United States ex rel. Arcara v. Flynn, 11 F. 2d 899;

Lewis' Southerland Statutory Construction.

The appellant was in the Navy at the time of the occurrences. He was on terminal leave and was recalled into the Navy and arrested. The property involved was Naval property in the Post Exchange. The acts are all alleged to be in connection with his conduct in the Navy and all the witnesses and personnel acquainted with the transactions were military personnel. Many rights and benefits accrue to the petitioner by reason of such a court martial proceeding: In the first place, it would have been the duty of Colonel Selden, under whose authority petitioner was arrested, to give petitioner a true copy of the charges and specifications at the time of arrest, and to confine the evidence solely to those damages (Art. 43), and convene a general court martial within ten days after

his arrest and try him forthwith, giving him a speedy trial. (Section 1200, Article 43, Title 34 U. S. C.)[1]

Second, the witnesses at the post exchange, familiar with the work, and having a knowledge of military interpretation of the Rules and Regulations, were available to him. The right to have the charges investigated in advance exists before court martial proceedings. He is entitled to military counsel and a trial and sentence by a body composed of officers of equal rank, at least half of whom have equal or higher rank. This affords him a body who understands military problems and military situations.

Furthermore, on conviction he is entitled to have that sentence modified and reviewed by the military authorities, and to be restored again to his rank as an officer, with all the benefits of the military rights. Appellate military reviewing bodies review both law and facts and can set aside the decision entirely.

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*Title 34, Chap. 21, Sec. 1200, Article 43:

"Article 43. Charges and specifications; arrest of accused. The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge. (R. S. §1624, art. 43.)"

On the other hand, a conviction in the civil court constitutes a conviction of a felony, which deprives him at all times of the military rights afforded to him under various acts of Congress.

The review afforded by the military authorities is a review of both the law and the facts and it is not circumscribed or limited as is the review by civil appellate courts.

In addition, the court martial fixes the punishment to be imposed.

The appellant was entitled to all of these substantial rights which were denied to him by the assumption of jurisdiction by the civilian court.

It is therefore highly important for this Court to determine whether a military person, subject to military law, is entitled as a matter of right and due process to have accusations founded against him and growing out of his work in a military post exchange tried by a court martial rather than a civilian court, and whether any other trial is contrary to the Fifth Amendment to the Constitution of the United States and the mandatory provisions of Section 1200 of Title 34.

II.

The Court Was Without Jurisdiction by Reason of the Fact That Jurisdiction Had Been Acquired to Try Appellant Before a Court Martial and He Had Been Imprisoned for That Express Purpose.

Appellant had received his discharge from the Marine Corps and continued as a civilian employee of the Camp Pendleton Post Exchange. He was recalled to the service. The circumstances show conclusively that he was recalled in order that the Marine Corps might regain jurisdiction over him so that he could be tried by court martial. Thereafter, he was arrested and held *incommunicado* for a period of more than thirty days, during which time he, of course, was deprived both of the opportunity to procure his release upon bail and of conferring with an attorney. Article 24 of Section 1200, Title 34, U. S. C. A., provides in substance that no commissioned officer shall be subject to arrest or confinement for a longer period than ten days unless a further period is necessary to bring the offender to trial by court martial. Amongst the offenses punishable by court martial are buying public military property and any other fraud against the United States. (Sec. 1200, Article 14, U. S. C. A., Title 34.) It was further the duty of Colonel Selden, under whose authority appellant was arrested, to convene a general court martial or to release appellant from the confinement.

Not only was he thus arrested and held under a harsh imprisonment, but advantage was taken by Naval officers

to extort a statement from him. In doing this they not only resorted to such threats as would render his statement inadmissible in a court of justice, but they exercised the power which they possessed as officers of the Navy.

The question is thus presented whether or not having thus deprived him of his civil rights, for the purpose of exercising authority over him, the Government could thereafter repudiate the power which it had exercised and deprive him of the right to a court martial.

The Government is estopped after having recalled him to the service and imprisoned him for the purpose of a court martial, from pursuing any other method of trial. Furthermore the issues have become *res judicata.*

The course that has been pursued here is one which excites indignation. Expression of that indignation can serve no useful purpose.

But implicit in the Fifth Amendment is the guarantee of a military trial for military personnel regarding military property. Sometimes this may be harsher, sometimes more considerate. Certainly it is more understanding of the facts and circumstances and compares to trial by jury in the vicinage where one resides by one not a military person.

III.

The Appellant's Rights Under the Fifth Amendment to the Constitution of the United States, in Its Due Process Clause Were Infringed. The Appellant Was Denied Due Process of Law Guaranteed by the Fifth Amendment to the Constitution of the United States in That When He Was a Witness on the Witness Stand, the Government Produced and Used Against Him for the Purposes of Cross-examination and Impeachment Certain Parts of a Confession Taken From Him While He Was in Military Confinement Before Arraignment Under Circumstances Constituting the Third Degree.

(A) The Appellant, Instead of Being Arrested, Arraigned Before a Magistrate and Given His Constitutional Rights, Was Recalled Into Military Duty and Thereafter Placed in Military Confinement Without Arraignment and Third Degreed.

Upon his cross-examination, appellant was asked if he was not questioned on or about the 22nd of January, 1946, by FBI Agent Walters, Major Durgance and by Commander Murrell [R. 1339]. Thereupon, counsel for the Government proceeded over appellant's objection, that it was not cross-examination, not an attempt to impeach the witness but an attempt to get before the jury a statement in the nature of a confession extorted from appellant under duress, to ask him if he had not made certain statements to those people at that time [R. 1340-1345]. It attempted to repeat the illegally gotten evidence by questioning the defendant about it in the very presence and eyes of the judge and jury. This constitutes unfair trial.

The United States Attorney cross-examined him from a statement taken after Robinson had been in technical

custody of the military authorities, without arraignment, and had been under close guard and without food for 15 hours, at which time his interrogation began and continued for approximately three hours, and until about 2:30 a. m. At about 10:00 a. m he was presented with a written statement which he signed only under duress, after having been in the hospital for five and one-half months after his return from fighting in the South Pacific where he was exposed to the enemy's fire and tropical diseases, and without any arraignment on the civil charges which were subsequently filed against him beyond the period of time when the statements could have been taken from him and used in evidence against him. It was an attempt to get the illegally gotten evidence before the jury by a subterfuge.

> "But where a person accused of crime testifies in his behalf he cannot be impeached by showing that he has made statements admitting his guilt, where such statements were not made under such circumstances as to be admissible as a confession."
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> *Harrold v. Territory of Oklahoma,* 169 Fed. 47;
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> *People v. Yeaton,* 75 Cal. 415;
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> *People v. Maggio,* 155 N. E. 373;
>
> *People v. Sweeny,* 304 Ill. 502;
>
> *State v. Wilson,* 39 N. W. 29.

> "It is true that these confessions were admitted upon the asserted theory that they were not introduced as confessions but merely as contradictory statements, for the purpose of impeaching the defendant as a witness, and upon the apparently innocent belief that the jury would not consider them at all except for the special purpose indicated. But we think that under

such a guise the prosecutors cannot be allowed to introduce confessions without the proper preliminary proof required by well-settled rules of evidence. The defendant was arrested the morning after the fire and taken to jail. She saw no attorney or other person capable of giving her advice. She swears that the Mrs. Ludwig and the constable and her mother and in fact everyone who had access to her told her that she would certainly be found guilty, and the best thing she could do was to confess and thus try to gain the kindness and mercy of her prosecutor and that she was offered money and other inducements to confess. The prosecution in making out its case did not offer these confessions presumably because it could not prove that they were made voluntarily.

"Therefore, at the close of the evidence in chief of the prosecution, the defendant was in this condition: She either had to forego the privilege of testifying in her own behalf and denying the charge under oath, or, if she did testify, then upon the theory of the prosecution, it could get in the confessions on cross-examination without the preliminary proof. We do not think this to be the fair meaning of the law; and we think the admission of the confessions was a material error."

People v. Yeaton, 75 Cal. 415, at 417, 418.

The use of these statements for any purpose whatsoever was contrary to the decisions of the Supreme Court of the United States in

McNabb v. United States, 318 U. S. 332;

Anderson v. United States, 318 U. S. 350;

Silverthorne Lumber Company v. United States, 251 U. S. 385;

Nardoni v. United States, 308 U. S. 338;

United States v. Bayer & Radovich, No. 606, Oct. Term, 1946;

United States v. Bayer, 156 F. 2d 964.

When an attempt was made to cross-examine the defendant Robinson upon these statements, trial counsel for the appellant vigorously objected.

The use of the statement and interrogations from the defendant violated the defendant's rights under the Fifth Amendment to the Constitution of the United States.

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716;

Canty v. Alabama, 309 U. S. 629, 84 L. Ed. 988;

White v. Texas, 310 U. S. 530, 84 L. Ed. 1342;

Lomax v. Texas, 313 U. S. 544, 85 L. Ed. 1513;

Ward v. Texas, 316 U. S. 547, 86 L. Ed. 1663;

Ashcraft v. Tennessee, 322 U. S. 143, 88 L. Ed. 1192;

Malinski v. New York, 324 U. S. 401, 89 L. Ed. 1029.

The defendant would have been entitled to have the confession suppressed.

In re Fried, 161 F. 2d 453.

In *Pennekamp v. Florida,* 328 U. S. 331, 350, at page 360, Justice Frankfurter condemned the use of third degree statements in any form.

In *Silverthorne Lumber Company v. United States,* 351 U. S. 385 64 L. Ed. 319, at page 321 Justice Holmes said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

Justice Holmes further said:

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of knowledge obtained by that means which otherwise it would not have had.
>
> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it return them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."

IV.

The Other Questions Raised by This Petition Concern Fundamental Questions of Criminal Law on Which This Court, in the Exercise of Its Supervisory Power, Should Grant a Hearing and Reverse the Judgments Below.

McNabb v. United States, 318 U. S. 332.

These questions are the following:

(1) Count One of the indictment charged a conspiracy to violate the false claims statute, Title 18, Section 80, U. S. Code (1946 Edition); Counts Two, Three and Four involve the same statute and different acts which were alleged in connection with Count One.

Counts Two, Three and Four involve the appellants and others the same as Count One, and necessarily involved a conspiracy to commit the acts charged just the same as Count One did.

As the acquittal of Count One and acquittal of Counts Two, Three and Four on the principle of *res judicata,* because every issue tried in Count One and determined by the jury, were issues necessarily involved in Counts Two, Three and Four.

In *Sealfon v. United States,* 332 U. S. 575, 92 L. Ed. 180, this court held that the principle of *res judicata* applies in criminal cases just as civil cases. The United States Court of Appeals sought to distinguish this case from the *Sealfon* case on the basis that there were two trials in the *Sealfon* case whereas here the acquittal happened in a single trial. However, the principle is equally applicable if the acquittal of Count One, which was first returned into court by the jury, and first pronounced by the Clerk, determined every material issue that was raised in Counts Two, Three and Four. The fact that they were the same trial would not bar the principle for the reason

that each count in the indictment must be looked upon as though it was a separate indictment in fact; and, if Count One had been tried first, and separately, there could have been no different result on an attempt to try counts Two, Three and Four thereafter as there were if it was tried in the same case. The *Sealfon* case, therefore, is determinative of the issues below.

(2) The case also raises the important issue as to whether the discharge of the appellant Robinson by the Military authorities involved a court martial after he had been held in Military custody for more than seven weeks constituted jeopardy and a denial of speedy trial as guaranteed by the Constitution of the United States, in view of the express language of Article 43, Section 1200, Title 34, U. S. C.

Here the appellant was taken into custody for the purposes of military procedure. He was entitled to a prompt and speedy trial on the alleged offenses.

After seven weeks of custody, no court martial proceedings were instituted against him. By the dismissal by the Military branch and its failure to be brought to trial by the Government of the United States he was denied speedy trial guaranteed by the Constitution of the United States.

(3) At the time of trial, the prosecutor conducted questionings from some of the Government witnesses by leading questions known to have been false at the time of the questioning. This constituted an unfair trial tactics forbidden by the Fifth Amendment to the Constitution of the United States.

Hysler v. Florida, 315 U. S. 411, 86 L. Ed. 932.

(4) The trial court also limited the testimony of Colonel Selden, the arresting officer of appellant, to his co-defend-

ant and ordered counsel for the appellant "if he intended to cross-examine him, to cross-examine him at the time that Colonel Selden was on the witness stand" at almost the beginning of the trial. Thereafter he permitted the testimony to be made applicable to both defendants at the time, even though he had indicated that he would deny the right of cross-examination at a later time.

(5) While the appellant Robinson was on the witness stand, the court permitted cross-examination of questions and matters not brought out in direct examination, in violation of the appellant's rights under the Fifth Amendment to the Constitution of the United States not to have to incriminate himself.

He was asked about a beer contract and other matters in no way relating to the evidence on trial and not brought out in direct examination.

(6) For the purpose of prejudicing defendant in the eyes of the jury, and in violation of appellant's rights under the Fifth Amendment to the Constitution of the United States, the Court permitted the questioning of witnesses named Cates, Corbett and Linde, regarding an alleged solicitation of a bribe in connection with beer contracts in no way related to the case on trial, and alleged to have taken place two months prior to the date of any alleged formation of the conspiracy, and he permitted the introduction of this extraneous evidence to the great prejudice of appellant.

(7) The Court also should consider whether the trial court was without jurisdiction to try Captain Robinson in San Diego while the indictment of Captain Robinson was returned by a Grand Jury impanelled in Los Angeles, 125 miles away from San Diego, in a different division of the district from where the Grand Jury sat.

V.

The Court Was Without Jurisdiction to Try Robinson and a Motion in Arrest of Judgment Should Have Been Granted Because the Grand Jury Which Indicted Robinson Was Impaneled in Los Angeles and Was Therefore a Different Division Than San Diego Where the Trial Was Held.

It appears from the face of the indictment that the indictment was returned by a Grand Jury at Los Angeles, California, by a Grand Jury summoned therein. The Grand Jury which indicted Robinson should have been drawn from the vicinage where Robinson was to be tried, assuming that Robinson could be indicted by civilian authority at all.

The vicinage where Robinson was to be tried and where the alleged offense took place was San Diego and it was not within the power of the Grand Jury in Los Angeles, composed of citizens of Los Angeles to indict Robinson for an alleged offense in San Diego.

The Grand Jury which indicted Robinson was therefore without jurisdiction to return the indictment.

The Constitution provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless upon a presentment or indictment of a grand jury." (Constitution, Amendment V.)

Section 411, Title 28, U. S. C. A. (1946 Edition) provides that jurors, to serve in the Courts of the United States and in each state respectively, shall have the same qualifications . . . as jurors of the highest court of law in such state may have. It has been held that because of this section the state laws are controlling in

respect to the qualifications of jurors. *Pointer v. U. S.*, 151 U. S. 396, 38 L. Ed. 208; *St. Clair v. U. S.*, 154 U. S. 134, 38 L. Ed. 936; *Ballard v. U. S.*, 91 L. Ed. 181.) Grand jurors, like trial jurors, must therefore be selected from the vicinage.

It was the rule at common law that a defendant had a right to a trial by a jury of the vicinage; and in California it is held that this means a trial by a jury of the county in which the offense was committed and that therefore a change of venue cannot be granted on application of the people.

People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 A. L. R. A. 75.

And see:

Story on Constitution, Secs. 1769, 1779, 1791;

Cooley on Constitutional Limitations, 5th ed. p. 319.

Section 412, U. S. C. A. provides that all such jurors shall be publicly drawn from a box containing not less than 300 persons possessing the qualifications prescribed in the last section preceding. It is well settled under the laws of the State of California that a grand jury of one county has no jurisdiction to return an indictment for an offense committed in another county within the state. It would seem to follow that a jury drawn from the Central Division of the Southern District of California would have no jurisdiction to return an indictment for an offense committed within the Southern Division.

Also, there has been filed with the Clerk of the Court a certificate stating that the indictment was returned at Los Angeles by the Grand Jury impanelled and sitting at Los Angeles.

VI.

The Court Should Also Have Granted the Motion in Arrest of Judgment for the Reasons: (1) the Grand Jury Which Indicted the Appellant Was Illegally Composed; (2) the Petit Jury Which Tried the Appellant Was Illegally Composed.

On Motion in Arrest of Judgment the appellant attacked the authority of the civil court jury to try him because neither the Grand Jury nor the Petit Jury was drawn in accordance with the mandate of Title 28, U. S. C. A., Section 412, which provides that the Grand Jury must be drawn from a box containing at the time of each drawing the names of not less than 300 persons, and that the jury summoned during the session of court must be drawn from a box containing the names of at least 300 persons. The affidavit of the appellant in support of the Motion was denied and this fact stands uncontradicted in the record.

Congress had made the method of drawing Grand jurors as well as Petit jurors mandatory. If then, the defendant, Robinson was to be indicted, it could only be by Grand Jury composed in the manner set out in Section 412 of Title 28, and the Petit Jury likewise had to be so drawn or the indictment was void and all subsequent proceedings were void and the judgment should have been arrested upon this basis by the trial court.

Ballard v. U. S., 91 L. Ed. 195;
Thiel v. U. S., 66 Sup. Ct. 984.

Since the Grand Jury, like the jury, is supposed to come from the vicinage where the indictment is returned, it should have come from San Diego County, and not Los Angeles County, as the case was to be tried there.

VII.

The Court Erred in Requiring Appellant to Cross-examine Colonel Selden at a Time When the Greater Part of His Testimony Had Been Received Only as Against Appellant's Co-defendant and in Denying Appellant the Right to Cross-examine Colonal Selden After the Evidence of Said Witness Had Been Received Against Him. [R. 66.]

Colonel Selden was put on the stand almost at the beginning of the case. He was the arresting officer of the appellant and his testimony was restricted solely to the co-defendant. Therefore, in legal contemplation, there was no evidence against the appellant. Appellant's counsel requested leave to cross-examine Colonel Selden at a later time when it appeared that his testimony would become relevant. The court denied this request and told appellant' counsel that if he was going to cross-examine Colonel Selden at all, he had to do it right then, and that the court was not going to permit any further cross-examination after Colonel Selden left the stand.

To have attempted otherwise would have been a contempt of court.

Fisher v. Pace, 93 L. Ed. 485.

To have attempted any other proceeding than the court ordered would therefore have been a clear contempt of the court.

Nevertheless, at the close of the Government's case, the court permitted this testimony, admitted solely to the co-defendant, to be admitted against Captain Robinson.

It was misleading and erroneous to limit Colonel Selden's testimony to only one witness and then later—after Colonel Selden had gone and appellant had been denied the right of cross-examination—to admit it as against him.

This is an important question of criminal law, which should be settled by this court.

Conclusion.

We have briefed the major questions presented by this appeal, all of which are highly important in the supervisory power of this Court to settle these important questions and because some fundamental questions of criminal law have not been decided by this Court and others have been decided contrary to what the law should be.

Wherefore, petitioner prays that a Writ of Certiorari be granted, and the judgments reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 222 and 223

JOHN S. BLEKER, JR., AND RALPH L. ROBINSON,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Tr. 1553-1563 [1]) is reported at 175 F. 2d 4.

JURISDICTION

The judgments of the Court of Appeals were entered May 26, 1949 (Tr. 1564, 1565), and peti-

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[1] The record is in nine volumes. Volume I is labeled "Clerk's Record," Volumes II-VIII contain the transcript of the trial proceedings, and Volume IX contains the proceedings in the Court of Appeals. Volumes II-IX are not paginated consecutively to Volume I. References to that volume are designated CR. and references to the succeeding volumes are designated Tr.

tions for rehearing were denied June 29, 1949 (Tr. 1566). The petition for writs of certiorari was filed July 29, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether petitioner Robinson, a marine officer, was subject to trial by a civil court.

2. Whether cross-examination of petitioner Robinson relating to pre-trial statements he had made to investigating officers constituted reversible error.

3. Whether petitioners' acquittal on the conspiracy count of the indictment rendered their convictions on substantive counts void.

4. Whether a District Court sitting in one division of a district has jurisdiction to try defendants on an indictment returned by a grand jury convened in another division of the same district.

5. Whether the court prevented cross-examination of a government witness by petitioner Robinson's counsel.

STATUTE INVOLVED

Section 35(A) of the Criminal Code, 18 U.S.C. (1946 ed.) 80, provided:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in

the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On August 21, 1946, a grand jury for the Southern District of California, convened at Los Angeles in the Central Division, returned an indictment in four counts against petitioners and one Robert S. Gleason for offenses alleged to have been committed in the Southern Division of the District Court for the Southern District of California (CR. 2-17). Count one charged a conspiracy between

petitioner Bleker, who was a major in the United States Marine Corps Reserve and Post Exchange Officer at Camp Pendleton, Oceanside, California, petitioner Robinson, a captain in the United States Marine Corps Reserve and assistant to Bleker, Gleason, a civilian employed at the post exchange as office manager, and others unknown, to defraud the United States by depriving it of the honest, conscientious, faithful, and disinterested services of petitioners in the discharge of their duties and by impairing, obstructing, and defeating the lawful functions of the Army, Marine Corps, and Navy in supervising the sale of merchandise of post exchanges, and to violate Section 35(A) of the Criminal Code (18 U.S.C. (1946 ed. 80) by knowingly and wilfully concealing and covering up material facts within the jurisdiction of such departments and agencies of the United States by trick, scheme and device and by making and causing to be made false statements and representations in matters within the jurisdiction of those agencies (CR. 2-11). Count two alleged that during March and April 1946, the defendants knowingly and wilfully concealed and covered up from the United States Marine Corps the fact that one Dave Rose, a civilian dealer, agreed to pay and did pay to the defendants the sum of $8,146.90 as one-half of his profits in the resale of certain watches which had been sold to him by the Camp Pendleton Post Exchange and that the defendants concealed and covered up this fact by the trick, scheme, and device

of making entries on the books and records of the post exchange representing that the watches were sold to Rose at a total price of $38,174, and failing to record the sum of $8,146.90 as a part of the price, in violation of Section 35(A) of the Criminal Code (CR. 12-13). Count three alleged that the defendants knowingly and wilfully concealed and covered up from the United States Army the fact that certain equipment purchased from the Los Angeles Port of Embarkation Post Exchange for $1,675.25 was purchased for their own benefit and resale, and not on behalf of or for use of the Camp Pendleton Exchange, and that the defendants covered up and concealed this fact by various tricks, schemes and devices, among which were the use of a certification to the Los Angeles Port of Embarkation Post Exchange that the equipment was purchased for use at Camp Pendleton, the issuance of a Camp Pendleton purchase order covering the equipment, the destruction of the Camp Pendleton's copies of such purchase order, and the making of an entry in Camp Pendleton's records that such purchase order was void (CR. 13-16). Count four alleged that the defendants knowingly and wilfully made and caused to be made a false and fraudulent certification, in a matter within the jurisdiction of the Army, that certain equipment purchased by defendant Robinson from the Santa Ana Air Base Post Exchange was for the establishment or maintenance of his own business or for his own personal use and not for resale, and that such certification

was false and fraudulent in that Robinson purchased the equipment for resale by the defendants to civilian dealers not authorized to purchase it directly from the post exchange (CR. 16-17).

Prior to trial, Gleason withdrew his plea of not guilty and entered a plea of guilty to counts two and three (CR. 134-135). After trial in the Southern Division (see CR. 132-133, Tr. 2), Bleker was found guilty on count three and not guilty on counts one, two, and four; Robinson was found guilty on counts two, three, and four and not guilty on count one (the conspiracy count) (Tr. 1544). Bleker was sentenced to pay a fine of $5000, and Robinson was fined $5000 on counts two and four and sentenced to one year imprisonment on count three (CR. 314-317). The convictions were affirmed on appeal (Tr. 1564, 1565).

ARGUMENT

After careful consideration of the lengthy record and the many errors assigned by petitioners separately, the Court of Appeals properly concluded that no error existed as to either petitioner. Petitioners raise no point of substance before this Court and there is no occasion for further review.

While numerous questions are assigned by petitioners (see Pet. 13-18), the argument is devoted only to a limited number of them and principally concerns petitioner Robinson.

1. Petitioner Robinson contends (Pet. 22-37) that, being a member of the armed forces, only a

court martial, not a civil court, had jurisdiction to try him for "offenses or acts within his duties" (Pet. 22). He relies, rather curiously, on the portion of the Fifth Amendment which provides

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger * * *,

and he asserts that the question has never been decided by this Court (Pet. 28-29). He is clearly in error, for this Court has repeatedly held that civil courts have concurrent jurisdiction with courts-martial over offenses denounced, as here, by both the Articles of War and the criminal laws of the United States. Lower courts have also so held. *Ex parte Quirin,* 317 U. S. 1, 25-27; *Caldwell* v. *Parker,* 252 U. S. 376; *Franklin* v. *United States,* 216 U. S. 559; *Ex parte Mason,* 105 U. S. 696; *Coleman* v. *Tennessee,* 97 U. S. 509; *Kennedy* v. *Sanford,* 166 F. 2d 568 (C. A. 5), certiorari denied, 333 U. S. 864; *United States* v. *Canella,* 63 F. Supp. 377 (S. D. Cal), affirmed, 157 F. 2d 470, 482 (C.A. 9).

2. Petitioner Robinson contends that his cross-examination by the Government was improper and a denial of due process (Pet. 30-34). The record reflects that after the direct examination of Robinson, government counsel on cross-examination asked him whether he had made certain inconsist-

ent oral statements to investigating officers on a prior occasion (Tr. 1339-1345). Counsel for petitioner objected to this line of questioning and requested opportunity to show that any admissions made by petitioner were involuntary. The court held that such questioning was proper cross-examination and overruled the objection, but with leave to petitioner, if the occasion should arise, to show on redirect examination the circumstances under which the statements were made (Tr. 1342). After the conclusion of the cross-examination, counsel for petitioner was allowed to show on redirect examination the circumstances of the interview with the investigating officers (Tr. 1397-1402). At no time was any prior statement offered in evidence or even marked for identification. Petitioner was at liberty, on his cross-examination, to admit, deny, or explain any statements he had made before trial and his answers were binding on the Government. We think the District Court was right in holding that this use of petitioner's statement, solely for impeachment purposes, was proper and that it in no way deprived petitioner of any rights guaranteed by the Fifth Amendment. See *Caminetti* v. *United States,* 242 U. S. 470, 494; *Raffel* v. *United States,* 271 U. S. 494, 497-499; *Viereck* v. *United States,* 139 F. 2d 847, 851 (C.A. D.C.), certiorari denied, 321 U. S. 794.

3. There is no merit in petitioners' contention (Pet. 36) that the jury's finding of not guilty on

the conspiracy count required acquittal on the substantive counts, under the principle of *res judicata.* Each count in an indictment is regarded as a separate offense and even if the same evidence is offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. *Dunn* v. *United States,* 284 U. S. 390.[2] It is settled too that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States,* 328 U. S. 640, 643.

Petitioners rely solely on *Sealfon* v. *United States,* 332 U. S. 575, in support of this contention. However, in that case, too, it was recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The ruling that the acquittal, on the indictment for conspiracy to defraud by presenting false invoices, was *res judicata* as to a second indictment for aiding and abetting the publishing of the same false invoices was, as the court below correctly pointed out, based on vitally different circumstances from those in the instant situation. The crux of that case at the second trial was an alleged agreement necessarily found in the first trial to have been non-existent. There is no similar inconsistency here between the absence of a conspiracy

[2] The Court of Appeals found there was sufficient evidence to convict Bleker on count 3, and "as to Robinson it may be said that there was a great abundance of evidence to support the verdict as to each count upon which he was convicted" (Tr. 1557).

and the individual commission of the substantive offenses.

4. Petitioners also claim (Pet. 38-39) that the trial court was without jurisdiction to try them because they were indicted by a grand jury sitting in another division of the Southern District of California. It is settled, however, that a grand jury sitting in any division of a multiple-division district may lawfully indict for crimes committed anywhere in the district. *Salinger* v. *Loisel*, 265 U. S. 224, 237. All that is required is that the trial be held in the division where the offense was committed. See Rule 18, F. R. Crim. P. and note of the Advisory Committee; *Borgia* v. *United States*, 78 F. 2d 550 (C.A. 9), certiorari denied, 296 U. S. 615; *Mizell* v. *Vickrey*, 36 F. 2d 327 (C.A. 10).

5. Petitioner Robinson further contends (Pet. 41-42) that the trial court required his counsel to cross-examine Colonel Selden, a witness for the prosecution, at a time when the greater part of Selden's testimony had been received in evidence only as against petitioner Bleker, and denied the right to cross-examine Selden when the testimony previously limited to Bleker was, on motion of the Government, admitted against both petitioners. This contention is contrary to the facts disclosed by the record.

The record shows that Colonel Selden was called as a witness by the prosecution and testified without limitation except as to two conversations between

him and Bleker (Tr. 2-37). At the conclusion of the direct examination and cross-examination by Bleker's counsel, the court asked Robinson's counsel whether he desired to cross-examine the witness. Robinson's counsel stated that he had no desire to cross-examine the witness concerning anything admitted against Robinson but that he might wish to cross-examine him later if the portions of his testimony limited to Bleker should thereafter be admitted against Robinson. The court stated that counsel must conduct his cross-examination before the witness left the stand and that if he did not do so the witness would not be called back later unless counsel wanted to make him his own witness; the court observed that the case could not be tried piecemeal. (Tr. 65-66). The record thus clearly indicates that Robinson was given full opportunity to cross-examine the witness. At the conclusion of the Government's case, when certain portions of Selden's testimony previously limited to Bleker were admitted as against Robinson (Tr. 914-922), no request was made by counsel for Robinson for permission to cross-examine Selden. In these circumstances, Robinson cannot now be heard to complain that he was deprived of his right to cross-examine the witness. *Blumenthal* v. *United States*, 158 F. 2d 883, 891 (C.A. 9), affirmed, 332 U. S. 539.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writs of certiorari should be denied.

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